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No. 87-1359

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

DeMENNO/KERDOON,

Petitioner,

v.

THE UNITED STATES,

Respondent,

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Federal Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Rule 28.1 Listing. The required information is set forth in the Petition for Certiorari at p. iii and remains accurate.

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ARGUMENT

1. In language of notable clarity, the Tucker Act provides that the Claims Court "shall have jurisdiction to render judgment upon any claim against the United States" for breach of contract, 28 U.S.C. § 1491(a)(1) (1982), and thereby "'unequivocal[ly] waive[s]'" the immunity from suit the sovereign would otherwise be able to invoke against its aggrieved citizen, United States v. Mitchell, 463 U.S. 206, 215 (1983) (citation omitted).

There exists no fair indication, in either statutory language or legislative history, that Congress ever made a conscious judgment to withdraw that jurisdiction when the United States contractually promises to sell oil at prices established by other Federal laws, and thus render citizens remediless for the United States' breach of its contractual

promise. The absence of any such indicia of legislative intent is amply demonstrated by the fact that none is cited in the Brief For The United States In Opposition ("U.S. Brief"). On this controlling point, the telling feature of the U.S. Brief -- like Sherlock Holmes' "dog in the nighttime" -- is its silence.

Under this Court's consistent precedents, "implied repeal" of Tucker Act jurisdiction requires "'language showing that [Congress] made a considered determination to that end'". Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974) (citation omitted). "[T]he proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but 'whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction". Ruckelshaus

v. Monsanto Co., 467 U.S. 986, 1017 (1984) (emphasis added by Court; citation omitted). The United States can point to nothing in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 et seq. (1982) ("EPAA"), or its legislative history that begins to meet the "implied repeal" tests articulated by these cases.

Instead, the Government defends the decisions below by lamely arguing that the rule against "implied repeal" should be limited to cases where repeal of Tucker Act jurisdiction (and the concomitant withdrawal of its waiver of sovereign immunity) would pose Fifth Amendment Taking Clause issues. See U.S. Brief at 8-9. This Court has never indicated, much less held, that its precedents against implied repeal of the Tucker Act are so limited; and any drastic limit on those precedents of the sort urged by

the United States should come from this Court, not the lower Federal judiciary.

The rule against implied repeal of the Tucker Act is of major doctrinal significance to this century-old statute governing actions against the United States, see United States v. Palmer, 128 U.S. 262, 269 (1888), and its interplay with other present and doubtless future Federal statutes. The central tenet of that doctrine is the requirement of deliberate legislative action by the Congress if it intends to render the United States free to breach contracts with its citizens or violate other positive law -- the outcome the Government here seeks. See Regional Rail Reorganization Act Cases, 419 U.S. at 133-34; Ruckelshaus v. Monsanto Co., 467 U.S. at 1017-19. Thus, the United States' suggested "Taking Clause" limitation on the doctrine -- particularly when

combined with the fact that the Federal Circuit is now the only court with appellate jurisdiction over Tucker Act suits -- demonstrates that the question presented merits review by this Court.

2. Beginning with its formulation of the question presented, the U.S. Brief seeks to characterize this case as only "ostensibly" involving breach of contract -- as though a party who brings a Tucker Act contract action to recover for breach of a contractual promise is simply engaging in "artful pleading" to avoid EPAA jurisdictional rules. The United States argues that an action for breach of express written contractual covenants must nonetheless be held to "arise under" the EPAA, not the contracts that embody the promises made by the United States and at issue in this suit. This expansive reading of "arising under" -- which conflicts

with this Court's reasoning in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. __, 92 L. Ed. 2d 650, 654 (1986) -- is urged as necessary to vindicate Congress's desire for "swift and uniform interpretation" of Federal price control laws, expressed by its channeling such issues through the district courts and the Temporary Emergency Court of Appeals ("TECA"). See U.S. Brief at 10-11.

This argument is rather disingenuous coming from the United States. The effect of the decision below that these Tucker Act contract actions "arise under" the EPAA -- coupled with TECA's adoption in other cases of the Government's position that it has not waived sovereign immunity in EPAA suits -- is not "swift and uniform interpretation" of Federal price control laws. Rather, the result is no "interpretation" of such laws in

any forum in actions against the United States, even when it violates express contractual promises to be bound by such laws. The Government argues that EPAA swallows the Tucker Act not because it wants all EPAA issues litigated consistently in one court, but rather because it wants no EPAA issues litigated against it in any court, even when it violates a contract that incorporates EPAA standards.

The United States' argument is also unpersuasive on its own terms. Congress doubtless desired (and achieved) a considerable measure of swiftness and uniformity by directing that most cases presenting EPAA issues be entertained by the Federal district courts and by TECA on appeal. But it declined to establish any single-minded scheme of the sort required to support the Government's theory, which would presuppose that no court other than

the district courts and TECA may pass on EPAA questions under any circumstances. The EPAA itself provides (as the United States admits) that Federal price control issues arising by way of defense may be adjudicated by State courts. Similarly, actions under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq. (1982) ("OSCLA"), which may also present issues of Government compliance with Federal price control laws, must be brought in the Claims Court under the Tucker Act -- as the Fifth Circuit has held at the United States' urging. Amoco Production Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987), cert. pending, No. 87-372.

In short, Congress plainly did not believe that the virtues of consistent statutory interpretation required that all cases presenting Federal price control issues be entertained under the EPAA

procedural scheme. A Congress that intended (as the United States argued and the Fifth Circuit held in Amoco) that OCSLA actions asserting Government violation of Federal price control laws must be brought in the Claims Court under the Tucker Act, could not also have "intended" (as the United States argued and the Federal Circuit held here) to forbid the Claims Court to adjudicate Federal price control issues in actions arising under contracts with the Government incorporating those legal standards by reference.[1]

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[1]In conceding that courts other than the district courts and TECA may consider EPAA issues, the United States says there is a difference between "claims" and "defenses" -- but makes no effort to explain how that "difference" comports with the absolutist "uniformity of interpretation" thesis on which its implied Tucker Act repeal argument depends. See U.S. Brief at 8 n.7. Moreover, "uniformity" can be served by other means -- such as Claims Court deference in Tucker Act cases to TECA precedent on substantive EPAA issues -- without the damage to private party rights (and to this Court's precedents) inherent in any "implied repeal" theory.

The United States also argues that actions for breach of contracts incorporating Federal price control standards must be deemed to "arise under" the EPAA, lest everyone "opt out of" EPAA's procedural scheme simply by contracting to do what that Federal law requires. See U.S. Brief at 10-11. The supposed "logical extension" on which this argument rests transparently elides the very question presented in this case. Here, another Federal statute -- the Tucker Act -- expressly provides for Claims Court jurisdiction over contract actions against the United States, and the issue is whether EPAA repeals it. No such issue would or could be presented in a case involving only private parties. In any contract case not involving the United States, the aggrieved contracting party would not have a Tucker Act claim, and would have a district court remedy under the EPAA.

It is only in the circumstances presented here -- where the United States successfully contends in the Claims Court and Federal Circuit that EPAA repeals the Tucker Act, and successfully contends before TECA that EPAA does not waive its sovereign immunity -- that a party (guess who) is free to ignore its contract obligations and "opt out of" what Congress intended. The normal meaning of "arising under" advanced by DeMenno/Kerdoon comports with this Court's construction of Federal jurisdictional statutes in cases such as Merrell Dow, and does not (as the United States argues) permit private contracting parties to "opt out of" EPAA procedures. The expansive reading of "arising under" urged by the Government is inconsistent with Merrell Dow, and permits the United States to "opt out of" Tucker Act (or any other) liability for breach of its contractual promises.

The ultimate question presented is whether Congress intended that aberrational, manifestly unjust result. There is no indication in statutory language or legislative history that it did, much less that such a result is compelled by the statutory commands Congress did enact.

3. The United States claims that OCSLA, which independently requires the Department of Interior ("DOI") to comply with Federal price control laws, affords no basis for relief in this case. See U.S. Brief at 11 & n.12. In fact, OCSLA expressly creates a cause of action to "compel compliance" with its terms. 43 U.S.C. § 1349(a)(1). As the Government admits, such a provision in a price control statute authorizes restitution of illegal overcharges, see Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946) -- precisely the relief sought here.

The United States nonetheless suggests that OCSLA is not "a statute creating an action for money damages" as required by United States v. Mitchell, 463 U.S. at 216-17, to establish waiver of sovereign immunity. U.S. Brief at 11-12 & n.13. Once again, the United States seeks to evade liability for contractual breaches and violations of Federal law by placing a drastic limitation, never announced by this Court, on this Court's precedents.

A statutory action for "money damages" is not required for waiver of sovereign immunity where, as here, the claim is for return of money paid to but illegally extracted by the Government. United States v. Testan, 424 U.S. 392, 401-02 (1976). Second, even where the claim is not to recover monies previously paid but illegally extracted, the test for waiver of sovereign immunity is not whether the

statute says in terms that an action for "money damages" will lie. Rather, the test articulated by this Court is whether the underlying Federal statute "'can be fairly interpreted as mandating compensation by the Federal Government for the damages sustained.'" United States v. Mitchell, 463 U.S. at 217, and United States v. Testan, 424 U.S. at 402, both quoting Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967). OCSLA -- which expressly requires Government compliance with its terms and expressly authorizes actions to "compel compliance," a remedy that concededly includes restitution of illegal overcharges -- plainly meets that standard.[2]

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[2]Indeed, by any standard, the statutory basis for monetary relief against the United States is far clearer in the case of illegal overcharges under OCSLA than that which a majority of this Court found sufficient in United States v. Mitchell. See 463 U.S. at 219-28.

For both reasons, the United States' contention that OCSLA does not permit monetary relief in the circumstances presented contravenes settled law.

4. The weakness of the United States' position on the jurisdictional issue decided below is highlighted by its efforts to avoid review of that issue on other grounds. The Government variously suggests that petitioner did not exhaust administrative remedies or comply with the Contract Disputes Act as to claims arising before oil price decontrol (arguments not adopted by the courts below); that the Department of Energy ("DOE") might grant DOI a retroactive exemption from the regulations it violated;[3] that

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[3]In fact, DOE has not granted DOI an exemption for the transactions at issue; and DOE's disputed "authority" to grant "retroactive exemptions" in any case has yet to be reviewed by any Federal court.

most of DOI's violations were only technical in nature, and that it is "unlikely" DeMenno/Kerdoon "would obtain any significant relief" on the merits;[4] and that "federal oil price regulation" issues have no "ongoing significance." See U.S. Brief at 12-14 & n.14.

The last assertion rings hollow indeed to the American oil refining industry, whose companies large and small continue to face massive Government claims for overcharges during the regulated period. The "no ongoing significance" claim is particularly ironic in DeMenno/Kerdoon's case, since the United States presently is asserting claims against it for over $179,000,000 (an amount far in excess of its net worth) based on the same sorts of

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[4]This argument assumes facts not of record, and goes to the merits of claims that have never been adjudicated, due to dismissal below on jurisdictional grounds.

alleged violations that the United States committed here.

In denigrating the importance of this case by speculations about the merits and other matters not before this Court, the United States seeks to ignore the continuing significance of the issues that are presented for review -- "implied repeal" of the Tucker Act and the meaning of "arising under" in Federal jurisdictional statutes. Both issues will have significant, ongoing impact on the law governing claims against the United States; and both were erroneously decided below, on the basis of arguments that ignore or severely restrict this Court's precedents.

Moreover, both issues were decided in a context that permits the Government not only to ignore Federal laws with which Congress said it must comply, but also to

violate with impunity contracts it freely entered. The United States, having previously persuaded TECA that the district courts may not entertain EPAA actions against it because it has not waived sovereign immunity, has now persuaded the Federal Circuit that the Claims Court may not entertain these Tucker Act contract actions because they are "really" EPAA claims that must be brought in the district courts. Since TECA has exclusive jurisdiction of EPAA appeals, and the Federal Circuit has exclusive jurisdiction of Tucker Act appeals, only this Court is able to correct these mutually inconsistent lower court holdings.

Congress could not have intended the absurd outcome of the combined TECA and Federal Circuit holdings on these issues. Nor could it have intended the resulting manifest injustice to private parties who

contracted in good faith with the United States, and are now left without a remedy in any forum for the Government's breach of its contractual promises.

This Court has previously corrected per curiam a similar injustice, premised upon similar sophistic arguments by the United States about a supposed "implied repeal" of Tucker Act jurisdiction rendering it immune from liability. See Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980). DeMenno/Kerdoon respectfully submits that a similar grant of certiorari and summary reversal would be equally appropriate in the case at bar.

CONCLUSION

For the foregoing reasons and those set forth in the Petition For Certiorari, the petition should be granted and the decision below reversed.

Respectfully submitted,

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